ORIGINAL

No. 91-7580

Supreme Court, U.S.
FILED
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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1991

*GARY GRAHAM,*
Petitioner,

v.

*JAMES A. COLLINS, DIRECTOR,*
*TEXAS DEPARTMENT OF CRIMINAL JUSTICE,*
*INSTITUTIONAL DIVISION,*
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

# RESPONDENT'S BRIEF IN OPPOSITION

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ATTORNEYS FOR RESPONDENT

* Counsel of Record

## QUESTION PRESENTED

Whether the court of appeals below correctly determined that Texas' special issues provided an adequate vehicle under the Eighth Amendment for consideration of Petitioner's youth, positive character traits and family background.



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# RESPONDENT'S BRIEF IN OPPOSITION

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division, Respondent herein, by and through the Attorney General of Texas, and files this Brief in Opposition.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the denial of habeas corpus relief to Petitioner, hereinafter "Graham," is reported at 950 F.2d 1009 and attached to the petition as an appendix.

## JURISDICTION

Graham seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1254.

## CONSTITUTIONAL PROVISIONS INVOLVED

Graham bases his claims upon the Eighth and Fourteenth Amendments to the United States Constitution.

## STATEMENT OF THE CASE

*A. Course of Proceedings and Disposition Below*

Graham was convicted in the 182nd Judicial District Court of Harris County, Texas, on October 28, 1981, of the capital offense of murder of Bobby Grant Lambert during the course of committing robbery. After a separate hearing on punishment, resulting in the jury's affirmative responses to the two special issues submitted pursuant to TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon Supp. 1991), a death sentence was assessed on October 30, 1981. Graham's conviction and death sentence were affirmed by the Texas Court of Criminal Appeals on June 12, 1984. *Graham v. State*, No. 68,916 (Tex. Crim. App. 1984). Certiorari review was not sought.

After an execution date was scheduled for July 30, 1987, Graham sought state habeas corpus relief. The execution date was rescheduled on three occasions, during which time a competency examination was conducted, the trial court held an evidentiary hearing, and state habeas relief was denied by the Court of Criminal Appeals. *Ex parte Graham*, No. 17,568-01 (Tex. Crim. App. Feb. 19, 1988).

On February 23, 1988, two days prior to his scheduled execution date of February 25, 1988, Graham filed a petition for writ of habeas corpus and moved for a stay of execution in the United States District Court for the Southern District of Texas, Houston Division. The next day, the district court denied the writ and the stay application, but a panel of the United States Court of Appeals for the Fifth Circuit stayed Graham's execution. On August 31, 1988, the panel affirmed the district court's judgment. *Graham v. Lynaugh*, 854 F.2d 715 (5th Cir. 1988). However, on July 3, 1990, this Court vacated the Fifth Circuit's judgment and remanded the case for reconsideration in light of the decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989).



On remand and after supplemental briefing, the panel, Judge Jolly dissenting, reversed the judgment of the district court on March 7, 1990, and ordered the case remanded to the district court. *Graham v. Collins*, 896 F.2d 893 (5th Cir. March 7, 1990). On June 4, 1990, however, the court of appeals granted Respondent's suggestion for rehearing *en banc*. *Graham v. Collins*, 903 F.2d 1014, (5th Cir. 1990) (en banc). On January 3, 1992, the *en banc* court affirmed the district court's denial of habeas corpus relief. *Graham v. Collins*, 950 F.2d 1009 (5th Cir. 1992) (en banc).

*B. Statement of Facts*

In the evening of May 13, 1981, Bobby Grant Lambert, having just purchased groceries, was accosted in the grocery's parking lot by Graham, who attempted to rob him. After Lambert resisted Graham's robbery attempt, Graham pulled a pistol and put it to Lambert's head. Lambert then dropped his groceries, at which time Graham shot him in the chest. As Graham quickly walked away, Lambert stumbled back into the grocery store, where he died.

At the punishment phase of trial, the state introduced evidence that in nine separate incidents occurring within one week of his commission of capital murder, Graham committed nine aggravated robberies, armed with either a pistol or a shotgun, against thirteen victims. Among other things, Graham shot one individual in the neck, pistol whipped three individuals, stole five vehicles at gunpoint, and kidnapped and raped one individual. On May 14, 1981, Graham entered Clinton Jones' van, where he pulled a pistol and pointed it at Jones' head. After taking Jones' watch and wallet, Graham struck Jones with the pistol five times and then

shot him in the neck. Graham then stole Jones' van. Later that evening, Graham approached Linda Jennings and a friend as they were washing a friend's Cadillac at a carwash. Graham entered the car, pulled a pistol out and pointed it at Jennings' friend and then at Jennings. Graham then drove off in the Cadillac.

On May 15, 1981, Graham approached Yale Salsgiver in a parking lot and requested a ride, to which Salsgiver agreed. While in Salsgiver's truck, Graham pulled a shotgun, and he and Salsgiver struggled for possession of the gun. Salsgiver was able to escape, and Graham drove off in the truck. At approximately 6:30 p.m. on the same day, Graham approached Emory Dedman in his office's parking lot and requested a jumpstart for his van. As Dedman raised the hood of his Cadillac, Graham pulled a shotgun out and forced Dedman into the van, forced him to kneel in the van, relieved him of his watch, money and car keys, and drove off in Dedman's Cadillac. Later that evening in yet another parking lot, Graham pulled a shotgun on Richard Carter, forced him to kneel behind Carter's car, relieved Carter of his wallet, money, tool box and hat while keeping the shotgun one inch from Carter's head. Graham then struck Carter with the shotgun and left in his own car. Later that evening in the same parking lot, Carter again encountered Graham, who again brandished the shotgun.

On May 18, 1981, Graham and a second man approached Ernest Doakes in an apartment complex parking lot, where Graham entered Doakes' car, stuck a pistol in Doakes' ribs, and took Doakes' money. Graham and the second man drove off in Doakes' car. Also on May 18, Graham approached Mohen Nemefolli and a friend in a hotel parking lot, where he pulled out a pistol and demanded money from the friend. When Nemefolli objected, Graham hit him with the pistol and then stuck the pistol in Nemefolli's face. Graham absconded with a wallet, money and jewelry.



On May 19, 1981, Graham approached Richard Sanford in a parking garage, where he pulled a gun, announced his intent to rob Sanford and forced Sanford into Sanford's car. There, he pointed the gun at Sanford's stomach, relieved Sanford of his watch, ring, wallet and money, and threatened to kill Sanford. Graham ordered Sanford out of the car, again threatening to kill him, and frisked Sanford. Graham then left the area on foot.

On May 20, 1981, Graham requested a ride from Lisa Blackburn, a cab-driver. While in the cab, Graham pulled out a pistol and took Blackburn's wallet, money and some personal property from the trunk of the cab. Graham then threatened to rape Blackburn, hit her in the face and forced her to drive to an abandoned apartment. Forcing her inside the apartment, Graham fondled Blackburn's genitalia, raped her vaginally and then attempted to rape her anally. Graham then forced Blackburn to drive to her apartment, where Graham gathered some of her property and instructed her to orally copulate him. However, Graham then fell asleep, at which time Blackburn took his pistol and called the police. Graham was then arrested.

The state further introduced testimony from a juvenile probation officer regarding Graham's bad reputation.

Graham produced the testimony of his stepfather and grandmother during the punishment phase of trial, Graham's stepfather, Joe Samby, testified that Graham, who lived and worked with his father, would visit his mother once or twice a week. Graham was very nice, would do chores around the house when requested, never fought with Samby and was never violent. Graham loved and was very close to his mother, a "nervous type" who was currently on medication, and Graham had two children, for whom he tried very hard to provide food and clothes.

Graham's grandmother, Erma Chron, testified that Graham stayed with her intermittently, beginning at age three, because his mother was hospitalized numer-

ous times for a nervous condition that Chron classified as mental illness. While Graham was living with Chron, he attended church and school, was never violent and never possessed any weapons or caused any problems. Graham went to live with his father at age eleven or twelve.

Graham introduced no other evidence.

## SUMMARY OF ARGUMENT

There is no special or important reason for this Court to exercise its certiorari jurisdiction in this case. The rule Graham seeks, that youth is mitigating *per se,* regardless whether a defendant possesses any of the attributes of youth that cause it to be mitigating in a societal and constitutional sense, flies in the face of the Eighth Amendment's requirement of an *individualized* sentencing decision and was properly rejected by the *en banc* court below.

The court below properly considered and reconciled all of this Court's Eighth Amendment precedent in the area of sentencer consideration of mitigating evidence in the context of the Texas capital sentencing procedures. It correctly concluded that any mitigating aspects of Graham's youth could be given full effect in answering Texas' "deliberateness" and "future dangerousness" special issues. To the extent Graham's crime was attributable to aspects of the transitory condition of youth, the future dangerousness issue allowed the jury to give mitigating effect to that evidence.

Likewise, Graham's jury was able to consider and give mitigating effect to his good character evidence and the circumstances of Graham's youth, wherein his mother had a possible mental illness. The evidence was offered and demonstrated that Graham's criminal behavior was an aberration from his otherwise good character, and the court below, applying the proper constitutional analysis, properly rejected the claim.

by Graham. *Graham v. Collins,* 950 F.2d 1009, 1026-1030 (5th Cir. 1992) (en banc). Rather, it found *Penry* inapplicable "where no major mitigating thrust of the [mitigating] evidence is substantially beyond the scope of all the special issues." *Id.* at 1027. The Court further stated:

> We believe that what *Penry* represents is a set of atypical circumstances of a kind that, quite understandably, neither the Texas Court of Criminal Appeals nor the Supreme Court in *Jurek* had in mind, namely circumstances where the defense's mitigating evidence would have either no substantial relevance or only adverse relevance to the second special issue. Typically, evidence of good character, or of transitory conditions such as youth or being under some particular emotional burden at the time, will tend to indicate that the crime in question is not truly representative of what the defendant's normal behavior is or may become over time, and that the defendant may be rehabilitable so as not to be a continuing threat to society. The core of *Jurek*-- which we cannot conclude has been abandoned -- is that the mitigating force of this kind of evidence is adequately accounted for by the second special issue. But in *Penry* the Court was faced for the first time with a wholly different type of mitigating evidence. Not evidence of good character, but of bad character, not evidence of potential for rehabilitation, but of its absence; not evidence of a transitory condition, but of a permanent one; but *nonetheless* evidence which was strongly mitigating because these characteristics were due to the uniquely severe permanent handicaps with which the defendant was burdened through no fault of his own, mental retardation, organic brain damage and an abused childhood. There was no way this type of evidence could be given any mitigating force under the second special issue. To recognize that, as *Penry* did, is not necessarily to deny the validity of *Jurek* as it applies to the more typical case.

*Graham,* 950 F.2d at 1029-30.



Further, the *Graham* court recognized and applied this Court's description of the manner in which character or background evidence attains constitutional mitigating value relevant to a defendant's culpability.

> "[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are *attributable* to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. . . . *Lockett* and *Eddings* reflect a belief that punishment should be directly related to the personal culpability of the criminal defendant. Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion.

*California v. Brown,* 479 U.S. 538, 545 (1987) (O'Connor, J., concurring); *Penry v. Lynaugh,* 492 U.S. at 319, 109 S.Ct. at 2947; *Graham,* 950 F.2d at 1031. Absent a nexus between the mitigating aspects of the defendant's character or background and his behavior, the evidence cannot reflect that he is less morally culpable than any other citizen. *See Graham,* 950 F.2d at 1031 (youth does not reflect a reduced culpability for conduct not attributable to it).

Finally, if the jury is able to consider and give effect to the mitigating force of the proffered evidence within the context of one of the statutory inquiries, the failure to provide additional instructions or vehicles by which the jury can consider and give effect to that evidence does not violate the Eighth Amendment. The Constitution does not require that the sentencer be permitted to give effect to the defendant's evidence in whatever manner or to whatever extent the defendant desires.[1]

---

1 In *Saffle v. Parks*, 494 U.S. at ___, 110 S. Ct. at 1261, this Court noted that, while the holdings of *Eddings* and *Lockett* govern what factors the jury must be permitted to consider in making its sentencing decision, the Court has never promulgated "rules that govern how the State may guide the jury in considering and

Rather, the defendant is entitled only to *a* fair vehicle by which the sentencer can give effect to the mitigating force of his evidence. *See Boyde v. California,* 494 U.S. 370, ___ n.5, 110 S. Ct. 1190, 1199 n.5 (1990); *Saffle v. Parks,* 494 U.S. at ___, 110 S. Ct. at 1261; *see also Penry v. Lynaugh,* 492 U.S. at 321 (no Eighth Amendment violation in *Franklin v. Lynaugh,* 487 U.S. 164, 108 S.Ct. 2320 (1988), because jury able to give effect to the mitigating force of evidence).

Recognizing this Court's holding in *Saffle,* the unique factual circumstances of *Penry,* and the similarity of the evidence Graham presents with that of the defendant in *Jurek v. Texas,* the *Graham* Court correctly reasoned that *Penry*'s rule was applicable where a major mitigating thrust of the evidence is substantially beyond the special issues. 950 F.2d at 1027; *see also id.* at 1031-32 & n.28 (defendant is not entitled to additional vehicle for consideration of mitigating evidence where there is nothing in the record to suggest that defense counsel desired to have evidence considered in another manner). Graham's evidence, as offered, does not implicate *Penry*. The major mitigating thrust of his youth could be given full effect in answering the second special issue, whether there was a probability that Graham would commit criminal acts of violence that would constitute a continuing threat to society.

> [W]hatever is mitigating about youth tends to lend support to a "no" answer to the second special issue, and its tendency to do so is essentially proportional to the degree to which the jury concludes such factors were influential in the defendant's criminal conduct. The greater the role such attributes of youth are found to have played in the defendant's criminal conduct, the stronger the inferences that, as his youth passes, he will no longer be a danger to society.

*Graham,* 950 F.2d at 1031; *accord Wilkerson v. Collins,* 950 F.2d 1054, 1060-61 (5th Cir. 1992).[2] There is no indication that Graham desired the evidence to be considered for any purpose other than to show a lack of future dangerousness.

Graham relies on *Eddings v. Oklahoma,* 455 U.S. 104 (1982), and *Stanford v. Kentucky,* 492 U.S. 361 (1989), in urging a rule that youth is mitigating *per se,* regardless whether an individual defendant possesses mitigating qualities associated with youth. As this Court recognized, as a general rule, youths lack the maturity to be fully aware of the consequences of their actions and tend to be impulsive. However, the Court likewise recognizes that the general rule is not applicable to every member of the class of youthful defendants.

> Granting the plurality's other premise -- that adolescents are *generally* less blameworthy than adults who commit similar crimes, it does not necessarily follow that *all* 15-year-olds are incapable of the moral culpability that would justify the imposition of capital punishment.

*Thompson v. Oklahoma,* 487 U.S. 815, ___, 108 S. Ct. 2687, 2708 (1988) (O'Connor, J., concurring) (emphasis added).

> Our history is replete with laws and judicial recognition that minors . . . *generally* are less mature and responsible than adults. Particularly "during the formative years of childhood and adolescence, minors *often* lack the experience, perspective, and judgment" expected of an adult.

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weighing those factors in reaching a decision." "States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" *Boyde v. California*, 494 U.S. at ___, 110 S. Ct. at 1196 (1990), *citing Franklin v. Lynaugh*, 487 U.S. at 181 (plurality opinion).

2 While the *Graham* court focused on the second special issue, it further noted that mitigating aspects of youth could be adequately considered under the first and third special issues, which served to reinforce the court's conclusion that Graham was not entitled to relief. 950 F.2d at 1033 n.30.

*Eddings,* 455 U.S. at 115-16. Further, in relying on *Eddings,* Graham ignores the *ratio decidendi* of that case, as explained by Justice O'Connor in *California v. Brown,* 479 U.S. at 545, and incorporated by this Court in all subsequent cases addressing the issue of consideration of mitigating evidence, that punishment should be directly related to personal culpability and that a disability attains societal, and thus constitutional, significance where behavior is attributable to that disability.

Graham cannot legitimately contend that the general attributes of youth that render it mitigating in society's eyes cannot be fully considered under the "deliberateness" and "future dangerousness" special issues submitted in all Texas capital cases. Likewise, he cannot legitimately claim that there is any evidence that establishes, or even suggests, that Graham actually possessed any of those attributes of youth that render it mitigating in society's perception, thereby attaining Eighth Amendment's significance, as set forth in *Brown.* Thus, at best, Graham seeks a rule allowing a jury, after fully considering the mitigating aspects of his youth, weighing the aggravation and mitigation and finding that mitigation did not raise a reasonable doubt as to the special issues, to still be able to confer a grant of mercy based on the biological fact of his age. The State has a legitimate interest in preventing such unguided discretion. *Saffle v. Parks,* 494 U.S. at ___.

As the court of appeals below correctly recognized, Graham, relying on Eighth Amendment authority mandating an *individualized* sentencing decision, claims entitlement to relief not because of *individual* attributes, but because of his *status* as a seventeen-year-old offender. This claim flies in the face of the Eighth Amendment's requirement of a rational individualized sentencing decision and should be categorically rejected. *Graham,* 950 F.2d at 1030 n.25, 1031 n.26.

Likewise, the court of appeals below correctly rejected Graham's claim that the jury could not give mitigating effect to his positive character evidence and his background evidence, consisting of his mother possible mental illness. The court



below correctly noted that, unlike negative character or background evidence that may offer an "excuse" for behavior, positive character evidence demonstrates that a defendant's criminal behavior is an aberration from his otherwise good behavior.

> Unlike *Penry* type disability evidence, which can reduce culpability where it is inferred that the crime is attributable to the disability while other similar offenders have no such "excuse," good character evidence provides no variety of "excuse." Further, absent some unusual indication of an essentially *permanent* adverse *change* in character (e.g., brain damage), to the extent that the testimony is convincing that the defendant's general character is indeed good it will also, to essentially the same extent, be convincing that he will not continue to be a threat to society.

*Graham,* 950 F.2d at 1033. Further, in addressing the evidence of Graham's mother's mental problems, the court below correctly concluded that it did not implicate *Penry,* stating:

> the entire context in which this testimony was presented . . . suggests that there was no adverse effect on Graham. There was no suggestion that he was unhappy, withdrawn, moody, difficult to control or the like, or that he had any mental or psychological problems. The entire thrust of the defense evidence, from both Samby and Chron, was the exact opposite, namely that Graham was a good, stable, nonviolent, ordinary youth. There is no substantial evidence that Graham's criminal conduct was "attributable to a disadvantaged background, or to emotional and mental problems," as Justice O'Connor used those terms in *Penry.*

*Id.* Employing this Court's reasoning in *Boyde,* the court of appeals properly concluded that Graham's evidence, as offered, demonstrated that his basic character is good and that his criminal behavior is aberrational. *See Boyde,* 470 U.S. at ___ & n.5. A Texas jury can give full mitigating effect to this evidence in answering the

second special issue, whether the defendant will continue to commit criminal acts of violence that will constitute a continuing threat to society.

In its thoughtful and carefully reasoned opinion, the *en banc* court below adopted a rule designed to harmonize the decisions of this Court that identify constitutionally recognized sentencing concerns, *California v. Brown*, 479 U.S. at 545 (personal culpability); *Penry v. Lynaugh* (same); *Skipper v. South Carolina*, 476 U.S. 1, 7 n.2 (1986) (capacity for rehabilitation or lack of future dangerousness), and that identify classes of potentially mitigating evidence, *Woodson v. North Carolina*, 428 U.S. 280 (1976) (character, record, circumstances of the offense); *Lockett v. Ohio*, 438 U.S. 536, 604 (1978) (same). The court of appeals' decision properly reconciles, in the context of Texas' capital sentencing procedures, this Court's precedent in the area of sentencer consideration of mitigating evidence. Certiorari does not lie to review the correct application of the proper legal standard, as embodied in these two lines of cases, to the particular facts of Graham's case.

## CONCLUSION

For these reasons, Respondent respectfully requests that the judgment of the district court be affirmed and the stay of execution be vacated.

Respectfully submitted,

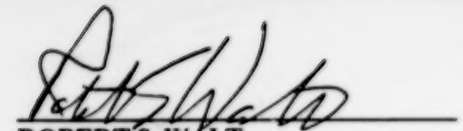
DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant Attorney General

MARY F. KELLER
Deputy Attorney General

MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division





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ATTORNEYS FOR RESPONDENT

**Office of the Attorney General**
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DAN MORALES
ATTORNEY GENERAL

May 8, 1992

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SUPREME COURT, U.S.

The Honorable William K. Suter
Clerk, United States Supreme Court
Office of the Clerk
1 First Street, N.E.
Washington, D.C. 20543

Re: *Gary Graham v. James A. Collins*, No. 91-7580

Dear Mr. Suter:

Enclosed for filing with the papers in the above styled cause are the original and nine typewritten copies of Respondent's Brief in Opposition. Also enclosed is the Proof of Service Form. Please indicate the date of filing on the enclosed copy of this letter and return it to me in the post-paid envelope provided.

By copy of this letter, I am forwarding a copy of said brief to counsel for Petitioner.

Thank you for your kind assistance in this matter.

Yours truly,

ROBERT S. WALT
Assistant Attorney General
(512) 463-2080

RSW/kh
Enclosures
c: Michael E. Tigar
University of Texas School of Law
727 East 26th St.
Austin, Texas, 78705

512/463-2100 P.O. BOX 12548 AUSTIN, TEXAS 78711-2548
AN EQUAL EMPLOYMENT OPPORTUNITY/AFFIRMATIVE

No. 91-7580

IN THE
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OCTOBER TERM, 1991

*GARY GRAHAM,*
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*TEXAS DEPARTMENT OF CRIMINAL JUSTICE,*
*INSTITUTIONAL DIVISION,*
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

## PROOF OF SERVICE

I hereby certify that on the 8th day of May, 1992, one copy of Respondent's Brief in Opposition was mailed, postage prepaid, to Michael E. Tigar, University of Texas School of Law, 727 East 26th St., Austin, Texas, 78705. All parties required to be served have been served. I am a member of the Bar of this Court.

ROBERT S. WALT
Assistant Attorney General
P.O. Box 12548, Capitol Station
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ATTORNEY FOR RESPONDENT

ORIGINAL

No. 91-7580

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

GARY GRAHAM,

Petitioner,

V.

JAMES A. COLLINS, DIRECTOR
TEXAS DEPTARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Petition for Writ of Certiorari and Motion for Leave to Proceed In Forma Pauperis were served on counsel for Respondent by placing same into the U.S. Mail, first-class postage prepaid, addressed to: Enforcement Division, Office of the Attorney General, Price Daniel Sr. Bldg., Austin, Texas, 78711, this 6th day of March, 1992. I further certify that all parties required to be served have been served.

Michael E. Tigar
Member, Supreme Court Bar

**Texas Resource Center**

(713) 522-5917
FAX (713) 522-2733

Vieux Carre Building
3223 Smith Street
Suite. 215
Houston, Texas 77006

March 9, 1992

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MAR 10 1992
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SUPREME COURT, U.S.

Mr. Jeff Atkins
Office of the Clerk
United States Supreme Court
1 First Street N.E.
Washington, D.C. 20543
202/479-3011

Re: Graham v. Collins, No. _____

**VIA FEDERAL EXPRESS**

Dear Mr. Atkins:

Enclosed for immediate filing please find enclosed two copies of Appendix F (Memorandum on the Denial of a Stay of Execution and Writ of Habeas Corpus, Graham v. Lynaugh, No. H-88- 563, S.D.Tex (February 24, 1988)) to Mr. Graham's **Petition for Writ of Certiorari**. As we discussed today on the telephone, this document was inadvertently left out of the Petition as filed on March 9.

Thanks so much for your assistance. If you have any questions, please do not hesitate to call.

Sincerely,

Robert C. Owen, by express permission
Jane B. Tigar

ROBERT C. OWEN
Attorney at law

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Petitioner GARY GRAHAM
Member, Supreme Court Bar

March 6, 1992

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United States Supreme Court
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Washington, D.C. 20543
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**VIA FEDERAL EXPRESS**

Dear Sir/Madam,

Enclosed for immediate filing please find enclosed one original **Affidavit in Support of Motion for Leave to Proceed In Forma Pauperis** in the above-captioned case. Mr. Graham's Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and Motion for Leave to Proceed In Forma Pauperis should arrive in this Court via Federal Express, under separate cover from this Affidavit, on March 9, 1992. I will contact you by telephone to confirm the filing of these papers. If you have any questions, please do not hesitate to call.

Sincerely,

* MICHAEL E. TIGAR
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* Counsel of Record for
Petitioner GARY GRAHAM
Member, Supreme Court Bar